Supreme Court, U.S.
FILED
APR 8 1998
CLERK

No. 97-1495

In The

Supreme Court of the United States

October Term, 1997

GENE ALLEN DAVENPORT,

Petitioner,

vs.

ORVILLE L. COADY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PATRICK KENNER AND THAYER COUNTY BANK

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner has stated any basis for this Court to exercise its power of certiorari in this case.

2. Whether the referral of Respondents' motion to dismiss to a magistrate judge for a report and recommendation, pursuant to 28 U.S.C. § 636(b)(1)(B), violated Petitioner's constitutional rights.

LIST OF ALL PARTIES TO THE PROCEEDINGS AND THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to these proceedings are:

List of Petitioners:

1. Gene A. Davenport

List of Respondents:

1. Orville L. Coady
2. Arthur P. Burnes
3. Joseph Murry
4. Gary R. Young
5. Nancy C. McLaughlin
6. Patrick Kenner
7. Thayer County Bank
8. Lloyd Vancleef
9. Citizens State Bank

The court whose judgment is under review is the United States Court of Appeals for the Eight Circuit.

Respondent, Thayer County Bank, is a Nebraska banking corporation. Thayer County Bank is a subsidiary of Thayer Agency, Inc. Thayer County Bank has no subsidiaries.

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Respondents, Patrick Kenner and Thayer County Bank, respectfully request that the petition for writ of certiorari be denied.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is unreported. The opinion of the district court (App. E, *infra*, 14a-15a) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on September 25, 1997. (App. B, *infra*, 3a-4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 636(b)(1) provides, in pertinent part:

* * *

Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may

reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1).

STATEMENT OF THE CASE

On January 6, 1997, Petitioner, Gene Allen Davenport ("Davenport") filed a "Complaint" in the United States District Court for the District of Nebraska against a Nebraska district court judge, two attorneys, a county sheriff, the clerk of the district court, two Nebraska banks, and the banks' respective chief operating officers. (App. G, *infra,* 17a-27a). The "Complaint" contained a mish-mash of allegations, accusations, and incorrect and misplaced citations of legal principles. Davenport accused Patrick Kenner and Thayer County Bank of "duress," "chilling effects doctrine," "deprivation of rights," "constitutional court," "conspiracy," "tort," "larceny by fraud or deception," and "extortion." Davenport concluded with a demand for $4,600,000 in damages under the guise of the "American Flag of Peace." Ironically, at the same time the "Complaint" demanded recovery against the Respondents, Davenport alleged that the court "lacked jurisdiction over the private citizen [Petitioner]."

All of the defendants named in the "Complaint," including Respondents, Thayer County Bank and its chief executive officer, Patrick Kenner [collectively "Thayer County"], eventually moved to dismiss the "Complaint" for failure to state a claim.

The motions to dismiss were referred to United States Magistrate David L. Piester for a report and recommendation by United States District Judge Richard G. Kopf pursuant to 28 U.S.C. § 636(b)(1)(A) and (B). (App. C, *infra,* 5a).

On April 7, 1997, Magistrate Piester entered a memorandum, order and recommendation. (App. D, *infra,* 6a-13a). Magistrate Piester recommended that the motions to dismiss be granted and that a motion for summary judgment

filed by Davenport be denied. *Id.* Magistrate Piester concluded that the Complaint should be dismissed. Davenport filed a timely objection to Magistrate Piester's recommendation. (App. H, *infra,* 28a-29a).

Pursuant to 28 U.S.C. § 636(b)(1), Judge Kopf reviewed Magistrate Piester's recommendations *de novo*, agreed that the "Complaint" should be dismissed and the motion for summary judgment should be denied, and entered a judgment dismissing Davenport's Complaint. (App. E, *infra,* 14a-15a).

On May 5, 1997, Davenport appealed the dismissal of the "Complaint" to the United States Court of Appeals for the Eighth Circuit. Following briefing by the parties, the court of appeals affirmed the dismissal of the "Complaint" *per curiam.* (App. A, *infra,* 1a-2a). A judgment affirming the district court was entered the same day. (App. B, *infra,* 3a-4a).

SUMMARY OF THE ARGUMENT

The petition for writ of certiorari should be denied. Davenport has set forth no compelling reasons why certiorari would be appropriate in this case. Davenport has identified no conflicting decisions between United States Courts of Appeal, no conflicting important federal questions between a United States Court of Appeals and a decision by a state court of last resort, and no United States Court of Appeal decision which is so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

Instead, Davenport simply alleges that he was deprived of his "constitutional rights," apparently by the referral of Davenport's motions to dismiss to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636. Because 28 U.S.C. § 636 is constitutional, Davenport has identified no

reason, compelling or otherwise, which would justify this Court's exercise of its certiorari power. Accordingly, the petition for writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONER HAS SET FORTH NO COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED.

This Court has identified several important factors which it considers in determining whether to grant certiorari. None of those factors are present here. Accordingly, the petition should be denied.

Supreme Court Rule 10 provides that a petition for writ of certiorari will be granted "only for compelling reasons." Rule 10 identifies the following criteria, which indicate the character of the reasons the Court considers in determining whether certiorari is appropriate:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that

> conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

S. Ct. Rule 10. Rule 10 concludes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Thus, Rule 10 sets forth the parameters of when and under what circumstances this Court will consider favorably a petition for writ of certiorari. In addition, this Court has held that it will not grant a certiorari merely to review evidence or inferences drawn from it, *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938), that certiorari is granted only in cases involving principals, the settlement of which is of importance to the public as distinguished from parties, *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951), and in cases where there is real and embarrassing conflict of opinion and authority between courts of appeal. *Id.*

In the case at bar, Davenport has identified none of the criteria which this Court has traditionally considered in determining whether to grant a petition for writ of certiorari. There are no conflicting decisions of United States Courts of Appeal in this case. There is no decision by a state court of last resort regarding an important federal question which conflicts with a decision of another state court of last resort in the United

States Court of Appeals. There is no important question of federal law that has been decided by a state court or United States Court of Appeals which has not been, but should be, settled by this Court.

In short, Davenport has identified none of the traditional criteria upon which this Court has customarily relied in granting certiorari in the past. Instead, Davenport simply wants this Court to address the same claims which have already been addressed and disposed of by a United States Magistrate Judge, a United States District Court Judge, and a panel of the United States Court of Appeals for the Eighth Circuit. Accordingly, there is no reason for this Court to grant the petition for writ of certiorari in this matter. The petition for writ of certiorari should be denied.

Furthermore, the basis for Davenport's petition for writ of certiorari is entirely unclear. Apparently, Davenport is complaining about alleged constitutional violations resulting from the district court's referral of the motions to dismiss to Magistrate Piester. However, there are many extraneous and unrelated matters, misstatements, and irrelevant contentions set forth in Davenport's petition and appendix, matters that do not appear in the record. Pursuant to Supreme Court Rule 15(2), Thayer County hereby points out to the Court that pages 7-51 and pages 58-63 of the appendix to Davenport's petition appear nowhere in the district court file or in the record before the court of appeals. Accordingly, Thayer County does not believe that those portions of Davenport's appendix fairly reflect the facts and circumstances upon which the district court entered its order in this case, and upon which the appeal to the court of appeals was based.

In any event, Davenport's petition has identified none of the factors set forth in Supreme Court Rule 10 which would indicate the existence of an issue or question important enough for this Court to consider exercising its power of certiorari.

II.

THE REFERRAL OF RESPONDENT'S MOTION TO DISMISS, PURSUANT TO 28 U.S.C. § 636(b)(1)(B), DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS.

Davenport's petition does not clearly state his position, which presents the same problems that Thayer County faced in dealing with Davenport's "complaint" filed in the district court below. It appears that Davenport is complaining about the referral of the various motions to dismiss to Magistrate Piester for a report and recommendation. Davenport appears to contend that this referral violated his constitutional rights in some way. Because the constitutionality of 28 U.S.C. § 636 has been previously addressed and disposed of by this Court, Davenport's complaints about alleged deprivation of constitutional rights are without merit.

28 U.S.C. § 636(b)(1) provides, in pertinent part:

* * *

> Notwithstanding any provision of law to the contrary —
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which

relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1).

Davenport appears to allege that the procedure involved in this case, the procedure sanctioned by 28 U.S.C. § 636(b), is unconstitutional. However, the constitutionality of 28 U.S.C. § 636(b) has been squarely addressed by this Court. *United States v. Raddatz*, 447 U.S. 667 (1980). In *Raddatz*, this Court granted certiorari

> to resolve the constitutionality of a provision of the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B), which permits a district court to refer to a magistrate a motion to suppress evidence and authorizes the district court to determine and decide such motion based on the record developed before a magistrate, including the magistrate's proposed findings of fact and recommendations.

Raddatz, 447 U.S. at 669. As Davenport seems to argue here, the respondent in *Raddatz* asserted that the referral of certain dispositive issues to a United States magistrate for a report and recommendation was violative of the United States Constitution. Finding the provisions allowing such referral to be wholly constitutional, this Court upheld the validity of the statute.

In *Raddatz*, the Court analyzed the provisions of 28 U.S.C. § 636(b)(1) to determine whether the referral of a dispositive motion to a magistrate judge for a report and recommendation unconstitutionally delegated the district court's Article III power to the magistrate.

> Certain "dispositive" motions, including a "motion . . . to suppress evidence in a criminal case," are covered by § 636(b)(1)(B). As to these "dispositive" motions, the district judge may "designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of

the court proposed findings of fact and recommendations for the disposition, by a judge of the court of [the] motion". However, the magistrate has no authority to make a final and binding disposition. Within 10 days after the magistrate files his proposed findings and recommendations, any party may file objections. The statute then provides:

> A judge of the court shall make a de novo *determination* of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions. § 636(b)(1) (emphasis added).

Raddatz, 447 U.S. at 673-74.

Turning to the constitutional challenge to § 636(b)(1)(B) and (C), the Court determined that those provisions do not violate the due process clause of the Fifth Amendment in Article III of the United States Constitution.

> We conclude that the due process rights claimed here are adequately protected by §§ 636(b)(1)(B) and (C). While the district court judge alone acts as the ultimate decisionmaker, the statute grants the judge the broad discretion to accept, reject, or modify the magistrate's proposed findings. That broad discretion includes hearing the witnesses live to resolve conflicting credibility claims. Finally, we conclude

> that the statutory scheme includes sufficient procedures to alert the district court whether to exercise its discretion to conduct a hearing and view the witness itself.

Id. at 680-81. The Court concluded that the statute "strikes the proper balance between the demands of due process and the constraints of Art III." *Id.* at 683-84.

While *Raddatz* involved referral of a motion to suppress evidence, that was the same type of "dispositive motion" listed in 28 U.S.C. § 636(b) which was referred to Magistrate Piester for a report and recommendation in the case at bar. As in *Raddatz*, the district court in this matter had the statutory authority under 28 U.S.C. § 636(b) to refer the motions to dismiss to a magistrate judge for a report and recommendation. And, as in *Raddatz*, the district court retained "the ultimate authority to issue an appropriate order." *See Raddatz*, 447 U.S. at 682. Accordingly, to the extent that Davenport's petition can be construed to include any constitutional challenge to 28 U.S.C. § 636(b), that issue has already been addressed and rejected by this Court.

Furthermore, while Davenport's position is far from clear, Davenport appears to argue that the process which was employed was unconstitutional, and not that the district court failed to follow the process which was in place. If, in fact, Davenport's petition can be construed as asserting that the district court failed to follow the proper statutory procedure, rather than contending that the statute itself is unconstitutional, Davenport's petition is also without merit. The motions to dismiss, dispositive motions under 28 U.S.C. § 636(b)(1)(B), were referred to a magistrate by a district court judge. The magistrate performed a thorough and careful review of the Complaint, concluded that it was without merit, and recommended that the motions to

dismiss be granted. The district court conducted a *de novo* review as required by Section 636, agreed with the magistrate's recommendation, and entered judgment on that basis. Based on the record, it is clear that the district court below followed the statutory provisions regarding referrals, reports and recommendations to the letter. Accordingly, to the extent that Davenport claims that the process followed was deficient, there is no reason to grant certiorari on that basis.

In summary, this is a simple case of defective pleading, a conclusion unanimously reached by three different levels of the federal judiciary on three different occasions. The record fails to establish any alleged invasion of Davenport's constitutional rights. Finally, the absence of any one factor traditionally present where certiorari has been granted precludes review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED SEPTEMBER 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2295

Gene Allen Davenport,

Appellant,

v.

Orville L. Coady, District Judge for the State of Nebraska, Thayer County Courthouse; John Does; Arthur P. Burnes, Attorney; Joseph Murray, Attorney; Gary R. Young, Thayer County Sheriff; Nancy C. McLaughlin, Clerk of the District Court; Patrick Kenner, CEO, Thayer County Bank; Lloyd Vancleef, CEO, Citizens State Bank,

Appellees.

Appeal from the United States
District Court for the
District of Nebraska

[UNPUBLISHED]

Submitted: September 3, 1997
Filed: September25, 1997

Before McMILLIAN, FAGG, and LOKEN, Circuit Judges.

Appendix A

PER CURIAM.

Gene Allen Davenport appeals from a final order of the United States District Court[1] for the District of Nebraska, dismissing his complaint with prejudice for failing to comply with Federal Rule of Civil Procedure 8, and denying his motions for summary judgment and for default judgment. We have carefully reviewed the record and affirm on the basis of the district court's opinion. *See* 8th Cir. R. 47B. We deny his motion for judgment against two appellees.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

---

1. The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, adopting the report and recommendation of the Honorable David L. Piester, United States Magistrate Judge for the District of Nebraska.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED SEPTEMBER 25, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-2295

Gene Allen Davenport,

Appellant,

v.

Orville L. Coady, District Judge for the State of Nebraska, Thayer County Courthouse; John Does; Arthur P. Burnes, Attorney; Joseph Murray, Attorney; Gary R. Young, Thayer County Sheriff; Nancy C. McLaughlin, Clerk of the District Court; Patrick Kenner, CEO, Thayer County Bank; Lloyd Vancleef, CEO, Citizens State Bank,

Appellees.

4: 97-CV-3001

Appeal from the United States
District Court for the
District of Nebraska

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

Appendix B

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

September 25, 1997

A true copy.

ATTEST: s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[stamp]
MANDATE ISSUED
NOV 21 1997

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED JANUARY 16, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

ORDER

IT IS ORDERED that all motions to dismiss filed by Defendants pertaining to Plaintiff's complaint (filing 9, in addition to similar responsive pleadings or motions not yet received) are referred to Magistrate Judge Piester for disposition or recommendations, as appropriate.

DATED this 16th day of January, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX D — MEMORANDUM, ORDER AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 7, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

v.

ORVILLE L. COADY, et al.,

Defendants.

MEMORANDUM, ORDER AND RECOMMENDATION

Pursuant to District Judge Richard G. Kopf's referral (filing 10) and 28 U.S.C. § 636(b)(1)(A, B), the following motions are before me for resolution: defendants' motions to dismiss (filings 9, 16, 17, 20, and 23); defendants' motion for Rule 11 sanctions (filing 21); defendant's objection to plaintiff's motion for summary judgment (filing 26); plaintiff's motions for summary judgment (filings 19, 24, and 25); plaintiff's motion to deny Defendant Coady's motion to dismiss (filing 11); and plaintiff's motion for default judgment as against Defendants McLaughlin and Young (filing 18). As explained below, I conclude plaintiff's complaint fails to comply with *Fed.R.Civ.P.* 8(a)(2) and thus, recommend it be dismissed.

Appendix D

ALLEGATIONS

Plaintiff has filed a complaint (filing 1) against numerous defendants, including a judge, a law enforcement officer, an elected official, several attorneys, and financial institutions.

Plaintiff's complaint is virtually incomprehensible. It generally consists of statements about the "American Free Flag of Peace," bald allegations of liability on such purported legal theories as "Perjury of Oath," "Duress," "Chilling Effect Doctrine," and "Deprivation of Rights," and is almost completely devoid of any allegations of fact. Plaintiff makes only a cursory attempt to identify the alleged acts and/or omissions on which his complaint purportedly is based. Plaintiff states that there was an agreement to dismiss a case involving Citizens State Bank and that Thayer County Bank filed a cross petition which was allowed by the presiding judge. Plaintiff fails to set forth the alleged conduct attributable to each of the numerous defendants.

DISCUSSION

Rule 8 of the Federal Rules of Civil Procedure provides that a complaint must contain, *inter alia:*

> (2) a short and plain statement of the claim showing that the [plaintiff] is entitled to relief . . .

Fed.R.Civ.P. 8(a)(2). This short and plain statement must provide "fair notice of the plaintiff's claims and grounds for relief." *Smith v. St. Bernards Real Med. Center*, 19 F.3d 1254, 1255 (8th Cir. 1994). A complaint, however, "that contains merely bare allegations of liability, without pleading facts giving rise to this liability," does not provide the opposing parties with

the "fair notices required by Rule 8. *Askanase v. Fatjo,* 148 F.R.D. 570, 573 (S.D. Tex. 1993) (citations omitted). "Even the liberal notice pleading allowed by the federal rules requires a pleading to include the operative facts upon which the pleader bases his claim." *Id.* (citation omitted).

Here there is nothing in plaintiff's complaint which remotely resembles the requisite "short and plain statement of the claim", much less provides defendants with fair notice of plaintiff's purported grounds for relief. Although a *pro se* complaint is to be liberally construed, *Haines v. Kerner,* 404 U.S. 519, 520-21 (1972), it must contain specific facts supporting its conclusions. *Martin v. Sargent,* 780 F.2d 1334, 1337 (8th Cir. 1985). A party's *pro se* status does not immunize such litigant from the requirements of Rule 8. *See Michaelis v. Nebraska State Bar Ass'n,* 566 F. Supp. 89, 92 (D. Neb.), *aff'd,* 717 F.2d 437, 439 (8th Cir. 1983). Thus, plaintiff's wholesale failure to set forth any facts in the complaint in support of his myriad legal claims clearly violates *Fed.R.Civ.P.* 8(a)(2).

Defendants' Motions

Defendants have filed motions to dismiss (filings 9, 16, 17, 20, and 23). In light of plaintiff's plain failure to plead supporting facts, it is axiomatic that the complaint does not state a claim upon which relief may be granted, even under the most liberal of standards. *See Carney v. Houston,* 33 F.3d 893, 894 (8th Cir. 1994) (consideration of motion to dismiss requires the court to construe allegations in the complaint in light must favorable to plaintiff). In fact, the complaint is wholly frivolous as it contains virtually no allegations of any specific facts suggesting the existence of a claim against the defendants. Therefore, I shall recommend defendants' motions to dismiss

the complaint (filings 9, 16, 17, 20, and 23) be granted pursuant to *Fed.R.Civ.P.* 12(b)(6).[1, 2]

Defendant Kenner filed an "Objection to Motion for Summary Judgment . . ." (filing 26) in response to plaintiff's motion for summary judgment against him (filing 24). Such a filing is an improper pleading under the local rules. No 'answer,' or 'opposition,' or 'response' to a motion, or any similarly titled 'pleading' in opposition to a motion shall be filed, delivered or served. NELR 7.1(b). An opposing brief is the proper response to defendant's motion to dismiss.[3] NELR 7.1(b). As such, I shall deny plaintiff's objection (filing 26) because such pleadings do not comply with NELR 7.1(b).

---

1. It should be noted that a motion to dismiss pursuant to *Fed.R.Civ.P.* 12(b)(6) is an appropriate mechanism to challenge "the form and sufficiency of a statement of a claim under Rule 8(a) (2) . . ." 5 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedures* § 1203 (2d ed. 1990). *See also Bard v. Crockett*, 1990 WL 509739, *1 (W.D. Mo. 1990) (explaining that "critical issue" in considering Rule 12(b)(6) motion is the sufficiency of the complaint as governed by Rule 8(a)), *aff'd*, 938 F.2d 185 (8th Cir. 1991), *cert. denied*, 502 U.S. 900 (1991).

2. Plaintiff's complaint appears to be similar to others recently filed in this court which contain identical allegations against other defendants. Filing meritless complaints which are groundless is abusive of this court and its process, for such complaints deprive the court of its resources, which should be used to resolve citizens' legitimate disputes. Plaintiff is advised that future complaints which fail to raise legitimate claims may cause the imposition of sanctions against him, monetary and otherwise. *See Fed.R.Civ.P.* 11.

3. Plaintiff has submitted a brief in support of his motion which I shall construe as a brief in opposition to defendants motion to dismiss.

Appendix D

Defendants Young and McLaughlin filed a "Motion for Rule 11 Sanctions" as well as a brief and index of evidence in support of the motion asking the court to impose appropriate sanctions against the Plaintiff for filing a Motion for Default Judgment in this proceeding." (Filing 21). Defendants Young and McLaughlin have failed to allege that they have followed the provisions of *Fed.R.Civ.P.* 11(c)(1). Specifically, Defendants Young and McLaughlin have failed to show that they waited 21 days after service of the motion on plaintiff to allow him to withdraw his motion for default judgment *before* filing their motion with the court. *Fed.R.Civ.P.* 11(c)(1)(A). In fact the only indication of service upon the plaintiff is the certificate of service accompanying the filed motion which indicates that a copy of the motion was mailed to plaintiff on the same day that it was filed. Therefore, I shall recommend that Defendants Young and McLaughlin's "Motion for Rule 11 sanctions" (filing 21) be denied.

Plaintiff's Motions

Plaintiff also has outstanding motions before the court. Plaintiff has filed motions for summary judgment (filings 19, 24, and 25) against Defendants Coady, Murray, Van Cleef, Kenner, and Burnes. Plaintiff has not even attempted to comply with the local rules pertaining to such motions, *See* NELR 7.1(a)(2) and 56.1(a), much less demonstrated that there exists no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Rather, plaintiff's supporting materials consist entirely of "Affidavit[s] of Amount Due" and "Brief[s] in Support of Motion for Summary Judgments, which in turn consist of nothing more than unsupported legal conclusions and numerous attachments of unknown and unexplained origin. Based on the obviously premature nature

of plaintiff's motion, the woefully inadequate nature of his supporting materials, and his flagrant disregard of the procedures governing summary judgment as set forth in the Federal Rules of Civil Procedure and the local rules of this court, I shall recommend plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied.

Plaintiff has filed a "Motion to Deny" Defendant Coady's motion to dismiss (filing 11). I shall deny plaintiff's "Motion to Deny" because, first, plaintiff's complaint does not conform to Rule 8, as explained above, and, second, such motions do not comply with NELR 7.1(b).

Plaintiff also has filed a Motion for Default Judgment" (filing 18) against Defendants Nancy C. McLaughlin and Gary Young. The issuance of default judgments are not favored by the law and are generally granted for willful violations of court rules or intentional delays. *See United States ex rel. Time Equipment Rental U Sales. Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *In re Jones Truck Lines. Inc.*, 63 F.2d 685, 688 (8th Cir. 1995). According to my calculations the deadline for responding to plaintiff's complaint with respect to Defendant McLaughlin was January 27, 1997.[4] The court record reveals that Defendants McLaughlin and Young's motion to dismiss (filing 17) was filed on February 3, 1997, five business days late and on the same day as the plaintiff's motion for default judgment (filing 18). There is no indication that Defendant

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4. The copy of the return receipt signed by Defendant McLaughlin filed with the summons on January 13, 1997 shows a delivery date of January 7, 1997. The date of service on Defendant Young is unclear. Plaintiff has filed a copy of the envelope sent certified mail, postmarked January 6, 1997 which was returned, refused.

McLaughlin and Young's failure to timely file a response was due to intentional delay. Therefore, I shall deny plaintiff's "Motion for Default Judgment" (filing 18).

IT THEREFORE HEREBY IS ORDERED:

1. Plaintiff's motion for default judgment (filing 18) is denied.

2. Plaintiff's "Motion to Deny" (filing 11) is denied.

3. Defendant Kenner's "Objection to Motion for Summary Judgment by Defendant Patrick Kenner" (filing 26) is denied.

FURTHER, IT THEREFORE HEREBY IS RECOMMENDED to the Honorable Richard G. Kopf, United States District Judge, pursuant to 28 U.S.C. § 636(b), as follows:

1. That defendants' motions to dismiss for failure to state a claim (filings 9, 16, 17, 20, and 23) be granted;

2. That Defendants Young and McLaughlin's motion for Rule 11 sanctions (filing 21) be denied;

3. That plaintiff's motions for summary judgment (filings 19, 24, and 25) be denied; and

4. That plaintiff's complaint (filing 1) be dismissed as to all defendants.

Plaintiff is hereby notified that unless objection is made within ten days after being served with a copy of this recommendation, plaintiff may be held to have waived any right to appeal the court's order adopting this recommendation.

Appendix D

Dated April 7, 1997.

BY THE COURT

s/ David L. Piester
United States Magistrate Judge

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on the Magistrate Judge's Memorandum, Order and Recommendation (filing 27) and the objection to such Memorandum, Order and Recommendation (filing 28), filed as allowed by 28 U.S.C. § 636(b)(1)(C) and NELR 72.4.

I have conducted, pursuant to 28 U.S.C. § 636(b)(1) and NELR 72.4, a de novo review of the portions of the Recommendation to which objections have been made. Inasmuch as Judge Piester has fully, carefully, and correctly applied the law, I need only state that Judge Piester's Recommendation should be adopted.

IT IS ORDERED:

Appendix E

1. The Magistrate Judge's Memorandum, Order and Recommendation (filing 27) is adopted;

2. The objections of the plaintiff (filing 28) are denied;

3. The defendants' motions to dismiss (filings 9, 16, 17, 20, 23) are granted;

4. The motion for Rule 11 sanctions filed by defendants Young and McLaughlin (filing 21) is denied;

5. The plaintiff's motions for summary judgment (filings 19, 24, 25) are denied as moot, as the defendants have been dismissed from this action pursuant to paragraph (3), above; and

6. Plaintiff's complaint is dismissed, and judgment shall be entered by separate document.

DATED this 29th day of April, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA DATED APRIL 29, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

4:CV97-3001

GENE ALLEN DAVENPORT,

Plaintiff,

vs.

ORVILLE L. COADY, et al.,

Defendants.

JUDGMENT

Pursuant to the court's Memorandum and Order previously filed in this matter, final judgment is entered in favor of the defendants and against the plaintiff, providing that the plaintiff shall take nothing as against the defendants and the plaintiff's complaint is dismissed with prejudice.

DATED this 29th day of April, 1997.

BY THE COURT:

s/ Richard G. Kopf
Richard G. Kopf
United States District Judge

APPENDIX G — COMPLAINT DATED JANUARY 6, 1997

Gene Allen, Davenport
General Delivery
Belvidire, Nebraska 68315
402-768-6429
Private Citizen

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Gene Allen, Davenport, General Delivery, Belvidire, Nebraska 68315, Private Citizen

Plaintiff

VS.

ORVILLE L. COADY, DISTRICT JUDGE FOR THE STATE OF NEBRASKA, THAYER COUNTY COURTHOUSE, P.O. BOX 297, HEBRON, NEBRASKA 68370, Et. al.

Defendants

"Complaint"

NOTICE: No review of this Complaint by the Court pursuant to NELR 3.4 will be allowed. (Ref. Hake v. Clarke No. 95-1960 United states Court of Appeals, Eighth Circuit).

This Case is under the Jurisdiction of the American Free Flag of Peace TITLE 4 U.S.C. 1 of the United states of America. No Admiralty or Maritime Jurisdiction will be allowed in the Jurisdiction of the . . .

Appendix G

Case No._____

Suing Damages $4,600,000.00

Incorporated Case No. 13845

See attached sheet of Defendants

Plaintiff requests a 7th A.U.S.C. Jury Trial in Lincoln

Appendix G

Attached sheet of Defendants

Defendant Attorney(s)

ARTHUR P. BURNES,
ATTORNEY
CONTINENTAL BUILDING
209 SOUTH 19TH STREET,
SUITE 500
OMAHA, NEBRASKA 68102-1712

JOSEPH MURRAY,
ATTORNEY
P.O. BOX 87
HEBRON, NEBRASKA 68370

Defendant Law Enforcement Officer(s)

GARY YOUNG
THAYER COUNTY SHERIFF
324 OLIVE
HEBRON, NEBRASKA 68370

Defendant Elected Official(s)

NANCY C. McLAUGHLIN
CLERK OF THE DISTRICT COURT
P.O. BOX 297
HEBRON, NEBRASKA 68370

Defendant Financial Institution(s)

PATRICK KENNER, CEO
THAYER COUNTY BANK
P.O. BOX 109
HEBRON, NEBRASKA
68370
AND ALL OTHERS

LLOYD VANCLEEF, CEO
CITIZENS STATE BANK
P.O. BOX 135
CARLETON, NEBRASKA
68326
AND ALL OTHERS

Et. al.

All Doe's 1 to 99

Appendix G

Plaintiff Affirms to tell the truth, and has
first hand knowledge of the facts.

s/ Gene Allen, Davenport
Gene Allen, Davenport, Private Citizen

Abbreviations:

F.R.C.P.=Federal Rules of Civil Procedure
U.S.C.=United states Codes
A.U.S.C.=Amendment United states Constitution
U.C.C .=Uniform Commercial Code

Person is replaced with Private Citizen in Stats Definition

FACTS

1. The District Court shall have original Jurisdiction of all Civil Actions arising under the Constitution, Law, or Treaties of the United states. TITLE 28 U.S.C. 1331

2. Under TITLE 28 U.S.C. 1343, the District Court shall have original Jurisdiction of any Civil Action authorized by Law to be commenced by any Private Citizen.

3. The Jurisdiction of the American Free Flag is the determining factor under which all Private Citizens' Rights are secured.

> This Flag is described as red, white, and blue, with a star to represent each state of the Union, on a field of blue, and stripes of red and white horizontally placed in alternation.

Appendix G

4. Because the Court did not join with the Jurisdiction of the American Free Flag of Peace, TITLE 4 U.S.C. 1, the Court lacked Jurisdiction over the Private Citizen.

5. Incorporated Case No. 13845 was agreed to be dismissed by Plaintiff, Citizen State Bank as of 10:30 A. M. on May 20, 1996.

6. Thayer County Bank filed a Cross Petition into Closed Case No. 13845, on May 22, 1996.

7. The Judge proceeded with the Cross Petition, knowing that Case had been Res Judicata before Cross Petition was filed, as per Judges admission in Court on June 24, 1996.

8. The Judge knew that the Constitutional Laws of the United states of America were correct, but acted against the Private Citizen(s), pursuant to, TITLE 18 U.S.C. 1621.

9. Attorneys are guilty of "Legal Malpractice", when they fail to use the skill, prudence, and diligence, Lawyers of ordinary skill and capacity, commonly possess and exercise in performance of tasks, undertaken. When failure proximately causes damage, this gives rise to an action in "tort". Rep Neel v Magana, Olney, Levy, Cathcart and Gelfand 6 Cal. 3d 176, 98. Cal. Rptr. 837, 838, 491, P. 2d. 421.

10. All Defendants are incorporated into this Case, pursuant to TITLE 28 U.S.C. 1343, for Knowledge of the Law, Negligence of the Law, and failure to stop and correct the wrongs against Plaintiff(s).

11. The Plaintiffs GOD Given Rights, Constitutional Rights, and Immunities secured by the Constitution of the United states

of America, in Amendments I, IV, V, VII, IX, and X were violated by the Defendants.

12. The Law states in TITLE 18 Chapter 79 U. S. C. A. Sec. 1621 (WEST 1994) Page 554 Par. 2d sec. (a):

> State pays all fees when Judge and Lawyers in concert violate "Oaths of Office", and cause "Perjury of Oath". Citizens can not be made to pay fees to have their U. S. Constitutional Rights violated."

13. The right to a trial by jury was not preserved as required by Amendment VII of the Constitution of the United states of America.

14. The 7th Amendment states: the right to a Common Law Court shall be preserved, and describes Jurisdiction of the Court by the American Free Flag of Peace, 4 U.S.C. 1.

15. Under the Jurisdiction of the American Free Flag of Peace, the United states Constitution is alive and well, and all rights are preserved. Private Citizen(s) are innocent until proven guilty.

16. The Law Enforcement Officer(s) swore an Oath to defend and protect the Private Citizens of this state, and for "Lack of Care", violated that Oath. Law Enforcement Officer(s) were enriched (got wages) for their actions in violating a Private Citizen's Rights.

17. A Private Citizen is entitled, under TITLE 28 U. S. C. 1343 (a) (2), "To recover damages from any Private Citizen, who fails to prevent, or to aid in preventing any wrongs mentioned in Section 1985 of TITLE 42, which he had knowledge were about to occur, and the power to prevent".

Appendix G

18. Plaintiff(s) is filing under Perjury of Oath, TITLE 18 Chapter 79 U. S. C. 1621, and for nonjoinder with the American Free Flag of Peace, TITLE 4 U. S. C. 1621.

19. Plaintiff(s) is accusing the Defendant Judge(s), with all of the following charges:

Count I---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

Count II---------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

Count III---------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

Count IV---------- "Deprivation of Rights"; Section 1985 of TITLE 42

Count V---------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

20. Plaintiff(s) accusing all Defendant Attorney(s), with all of the following charges:

Count I---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

Count II---------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

Count III-------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

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Count IV-------- "Deprivation of Rights"; Section 1985 of TITLE 42

Count V--------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

Count VI-------- "Conspiracy"; TITLE 18 U. S. C. 241

Count VII------- "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

Count VIII------ "Malpractice", Professional Misconduct or Unreasonable Lack of Skill; Rep. Matthews v. Walker, 34 Ohio App. 2d 128, 296 N.E. 2d 569, 571. 63 0.0. 2d 208.

21. Plaintiff(s) is accusing all of the Defendant Law Enforcement Of ficer(s), with all of the following charges:

COUNT I-------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

COUNT II------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT III------ "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

COUNT IV------- "Deprivation of Rights"; Section 1985 of TITLE 42

COUNT V--------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

Appendix G

COUNT VI------- "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

22. Plaintiff(s) is accusing all of the Defendant Elected Official(s), with all of the following charges:

COUNT 1---------- "Perjury of Oath"; TITLE 18 Chapter 79 U. S. C. 1621

COUNT II-------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT III------ "Deprivation of Rights"; Section 1985 of TITLE 42

23. Plaintiff(s) is accusing all of the Defendant Financial Institution(s), with all of the following charges:

COUNT I-------- "Duress"; Head v. Gadsden v Civil Service Bd., Ala. Civ. App., 389 So.2d 516, 519

COUNT II------- "Chilling Effect Doctrine"; North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656. (BLACKS LAW).

COUNT III------- "Deprivation of Rights"; Section 1985 of TITLE 42

COUNT IV------- "Constitutional Tort", TITLE 42 U. S. C. Sec. 1983

COUNT V------- "Conspiracy"; TITLE 18 U. S. C. 241

COUNT VI------ "Tort; K Mart Corp. v. Ponsock, 103 Nev. 39, 732 P. 2d 1364, 1368.

Appendix G

COUNT VII----- "Larceny by Fraud or Deception"; Model Penal Code, 223.3

COUNT VIII---- "Extortion"; Ref. 18 U. S. C. A. 871 et seq., 1951.

24. Damages in a claim, for violation of United states Constitutionally guaranteed Rights are recovered. Damages may be presumed, and damages may in circumstances, support award of the damages, Tracy v Robbins, D. C. S. C. 1966, 40 Fed.

25. Violation of Policy and Custom, come under intent of deprivation of Rights, under TITLE 18 U. S. C. A. 242 "Deprivation of Rights, under Color of Law, as against the Private Citizen.

"Prayer"

26. Plaintiff(s) Prays to the Court for relief in the amount of $100,000.00 (One Hundred Thousand Dollars) in damages for each charge specified in each category, for each Defendant listed under that category.

CONCLUSION

27. Plaintiff(s) has been hurt financially, suffered mental anguish, and physical hardship, because of acts committed by Defendants. The Court at Law, failed to examine the Law, and the United states Constitutional Rights of the "Cases of Incorporation", and advise, or represent the Plaintiff(s), as to the validity of stated Civil Rights and United states Constitutional Laws.

Appendix G

28. The Court knew, that the Constitutional Laws were valid, Pursuant to TITLE 18 U. S. C. 1621. Judges and Attorneys should have practiced Law with skill, care, and diligence in examination of "Cases of Incorporation", and the Judges should have discovered the defects. The Judges and Attorneys are guilty of want of care, skill, and diligence in the examination of Plaintiff's Rights, and in advising Plaintiff (s) in "Cases of Incorporation". Plaintiff (s) was misled, as to the facts stated in Court, and shown to Plaintiff (s) and members of "Cases of Incorporation".

29. Elected Officials operating under Color of Statute, Ordinance, Regulation, Custom, or Usage of a state or Territory, subjected, or caused to be subjected, a Private Citizen of the United states of America, or under the Jurisdiction thereof, to Deprivation of Rights, Privileges, or Immunities secured by the United states Constitution. .

s/ Gene Allen, Davenport Date January 6, 1997

Gene Allen, Davenport
General Delivery
Belvidere, Nebraska 68315
402-768-6429
Private Citizen

APPENDIX H — MOTION FOR DENIAL OF RECOMMENDATIONS AND ORDERS OF MAGISTRATE PIESTER DATED APRIL 21, 1997

Gene Allen, Davenport
% General Delivery
Belvidere, Nebraska 68315-9999
402-768-6429
Private Citizen

In the district court of the united States
for the district of Nebraska

4:CV 97-3001

Gene Allen, Davenport, % General Delivery, Belvidere, Nebraska 68315-9999, Private Citizen

Plaintiff

VS.

ORVILLE L. COADY, DISTRICT JUDGE FOR THE STATE OF NEBRASKA, THAYER COUNTY COURTHOUSE, P.O. BOX 297, HEBRON, NEBRASKA 68370, Et. al.

Defendants

"MOTION FOR DENIAL OF RECOMMENDATIONS AND ORDERS OF MAGISTRATE JUDGE PIESTER"

Pursuant to "Memorandum, Order and Recommendation" dated April 7, 1997, the Plaintiff, Gene Allen: Davenport, denies the Allegations made by Magistrate Judge, David L. Piester. Plaintiff requests the Honorable Judge Richard G. Kopf to Deny

Appendix H

the Memorandum, Orders and Recommendation made by Magistrate Judge, David L. Piester.

s/ Gene Allen: Davenport Dated: 4-17-97
Gene Allen, Davenport
% General Delivery
Belvidere, Nebraska 68315-9999
402-768-6429
Private Citizen